

STATE OF MICHIGAN
COURT OF APPEALS

NIGHTWATCH CAPITAL GROUP, L.L.C.,

Plaintiff-Appellee,

v

QUESTOR MANAGEMENT COMPANY,
L.L.C., QUESTOR PARTNERS FUND II, L.P.,
QUESTOR SIDE-BY-SIDE PARTNERS II, L.P.,
QUESTOR SIDE-BY-SIDE PARTNERS 3(C)1,
L.P., QUESTOR PRINCIPALS II, L.P.,
QUESTOR GENERAL PARTNER II, L.P., and
ROBERT D. DENIOUS,

Defendants-Appellants.

UNPUBLISHED
December 15, 2011

No. 299378
Oakland Circuit Court
LC No. 2008-096312-CZ

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for reconsideration. We reverse and remand for entry of judgment in favor of defendants.

In 2006, plaintiff and others filed an action in a New York state court against defendants arising from a dispute regarding a business transaction involving the purchase of coal mining operations. In the New York case, plaintiff's theories of liability included breach of contract, breach of partnership or joint venture agreement, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, promissory estoppel, interference with a contract, interference with a prospective business relationship, unjust enrichment, and quantum meruit. With the complaint, plaintiff attached documentation purportedly evidencing its contractual relationship with defendants. Defendants filed a motion to dismiss, and the New York trial court granted the motion, holding that plaintiff could not satisfy the statute of frauds. On appeal, the trial court's ruling regarding the statute of frauds was affirmed in *Nemelka v Questor Mgmt Co*, 40 AD3d 505, 506; 836 NYS2d 598 (2007), wherein the New York appellate court ruled in full as follows:

The motion court correctly held that, notwithstanding plaintiffs' characterization of its relationship with defendants as co-investors, partners or joint venturers, plaintiffs' claim is actually one for breach of an oral contract under which plaintiffs agreed to procure a business opportunity for defendants

and defendants agreed that a portion of plaintiffs' compensation was to be in the form of a limited right to co-invest with defendants in the opportunity. So viewed, the claim is barred by the statute of frauds (General Obligations Law § 5-701[a][10]). We reject plaintiffs' claim that they had a preexisting fiduciary relationship with the Statler defendants as well as their argument that the motion court erred in lumping the Statler defendants together with the Questor defendants as plaintiffs' contractual counterparts, given allegations showing that the fee plaintiffs separately negotiated with the Questor defendants was not intended to be shared with the Statler defendants, and that plaintiffs were otherwise pursuing their own interests. The documents relied on by plaintiffs do not satisfy the statute of frauds as they are unsigned drafts. Moreover, they do not include all the essential terms of the alleged agreement. The exception to the statute of frauds for part performance does not apply to General Obligations Law § 5-701 (a)(10). In any event, the claimed part performance is equally consistent with defendants' position that plaintiffs were to receive a transaction fee for their services in brokering the transaction as it is with plaintiffs' position that they were to receive a right of co-investment in addition to a transaction fee. Plaintiffs' remaining claims were properly dismissed as arising out of an alleged breach of an unenforceable agreement. We have considered plaintiffs' other arguments and find them unavailing. [Citations omitted.]

In Oakland Circuit Court in November 2008, plaintiff filed this action against defendants arising from the same subject matter as the New York litigation, the purchase of two coal mines. The Michigan complaint alleged causes of action for fraud and misrepresentation, breach of joint venture, breach of fiduciary duty, unjust enrichment, promissory estoppel, civil conspiracy, unfair competition, and constructive trust. Relying on the New York judgment, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), asserting that plaintiff's complaint was barred by the doctrine of res judicata and the Full Faith and Credit Clause of the United States Constitution, US Const, art IV, § 1. Plaintiff opposed the motion, arguing that res judicata did not apply because the New York court's ruling addressing the motion to dismiss, as opposed to a motion for summary judgment, did not constitute an adjudication on the merits. Plaintiff also maintained that the lawsuit in Michigan was not precluded because it could avail itself of Michigan's statute of frauds, which did not have a broker's provision as found in New York law. The trial court granted defendants' motion for summary disposition, ruling that res judicata applied and that Michigan did not have an interest in applying its statute of frauds when most of the defendants were New York residents and entitled to the protection of the law of the home state.

Plaintiff filed a motion for reconsideration, contending that the trial court erred in applying New York law because defendants were not residents of that state. Once it learned that none of the defendants were from New York, the trial court held that New York did not have an interest in the outcome and there was no reason to apply New York law. The trial court also reversed its position on the res judicata ruling, concluding that none of the issues needed to be relitigated because Michigan's statute of frauds did not include a broker's provision. Therefore, the New York judgment need not be given full faith and credit.

Defendants filed their own motion for reconsideration of the trial court's opinion and order that granted plaintiff's motion for reconsideration. Defendants asserted that the purpose of the Full Faith and Credit Clause was to prevent forum shopping and disparate results. That is, full faith and credit should be given to the New York judgment regardless of whether the case would have been dismissed pursuant to Michigan's statute of frauds. Defendants also asserted that the trial court relied on case law that had been reversed by the United States Supreme Court. The trial court denied defendants' motion for reconsideration, finding that foreign judgments entered entirely on the basis of procedural rules need not be given res judicata effect. The court noted that because statutes of limitation were procedural in nature, a ruling premised on a limitations period need not be given full faith and credit. The trial court found no basis to make a distinction between a statute of limitation and the statute of frauds. The trial court held that because the issues were not litigated in the New York action, there was no basis to apply New York law, and principles behind res judicata and full faith and credit (to prevent suits on matters already litigated) would not be served by dismissing plaintiff's suit. We granted defendants' application for leave to appeal.

Summary disposition decisions are reviewed de novo. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). "In reviewing whether a motion under MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Id.* at 175-176. Defendants' statement of the issue addresses the trial court's ruling regarding their motion for reconsideration, and a trial court's ruling regarding a motion for reconsideration is reviewed for an abuse of discretion. *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006). However, when the issue involves a question of law, the issue is reviewed de novo. *Id.*

The Full Faith and Credit Clause, US Const, art IV, § 1, provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

A judgment entered in another state is presumed valid and entitled to recognition in Michigan in light of the Full Faith and Credit Clause. *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 209; ___ NW2d ___ (2011). The purpose of the Full Faith and Credit Clause is to prevent the litigation of issues in one state that have been decided in another state. *LME v ARS*, 261 Mich App 273, 285; 680 NW2d 902 (2004). "A foreign judgment is conclusive and must be recognized if jurisdiction has been obtained over the parties and the subject matter." *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, ___; ___ NW2d ___ (2011). Full faith and credit is not due when either personal or subject-matter jurisdiction is lacking, and a collateral attack of a foreign judgment is permissible in Michigan upon a showing that the judgment is void for want of jurisdiction in the issuing court. *Id.*¹ The general rule is that parties should not be permitted

¹ Plaintiff does not dispute that the New York court had both personal and subject-matter jurisdiction.

to relitigate issues when they have been resolved by courts of competent jurisdiction. *San Remo Hotel, LP v City & Co of San Francisco*, 545 US 323, 336; 125 S Ct 2491; 162 L Ed 2d 315 (2005). Without this rule, there would never be an end to litigation. *Id.* at 336-337.

The Full Faith and Credit Clause requires that a foreign judgment be given the same consequence that it has in the state of its rendition. *Hare*, 291 Mich App at 209. In *McMath v McMath*, 174 Mich App 576, 583; 436 NW2d 425 (1989), this Court, citing *Durfee v Duke*, 375 US 106; 84 S Ct 242; 11 L Ed 2d 186 (1963), stated:

The full faith and credit clause of the United States Constitution requires that judicial proceedings shall have the same full faith and credit in every court within the United States as they have by law or usage in the court of the state from which they are taken. Full faith and credit thus generally requires every state to give a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it.

Accordingly, we must examine the law of res judicata as developed in the state of New York. In *Parker v Blauvelt Volunteer Fire Co, Inc*, 93 NY2d 343, 347; 690 NYS2d 478; 712 NE2d 647 (NY App, 1999), the court observed:

Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.” Thus, where a plaintiff in a later action brings a claim for damages that could have been presented in a prior . . . proceeding against the same party, based upon the same harm and arising out of the same or related facts, the claim is barred by res judicata. [Citations omitted.]

“Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties or those in privity with them of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior action.” *Grant v Aurora Loan Services*, 88 AD3d 949; 932 NYS2d 74, 75 (2011) (citations omitted). Plaintiff here contends that the New York trial court’s ruling on the motion to dismiss did not constitute an adjudication on the merits for purposes of res judicata. We disagree. Plaintiff notes that the New York action was dismissed pursuant to New York’s Civil Practice Law and Rules (CPLR) 3211(a)(7), which, consistent with our MCR 2.116(C)(8), provides for dismissal of a cause of action on the ground that “the pleading fails to state a cause of action[.]” Therefore, according to plaintiff, the dismissal was not an adjudication on the merits. However, under New York law, the label attached to the motion is not controlling. *Grant*, 932 NYS2d at 76 (where documentary evidence is submitted and considered on a motion to dismiss brought pursuant to CPLR 3211[a][7], the question becomes whether the plaintiff factually has a cause of action, not whether the plaintiff has stated one). Furthermore, in New York, a dismissal premised on the statute of frauds is given claim preclusive effect to bar a second action. *Smith v Russell Sage College*, 54 NY2d 185, 194; 445 NYS2d 68; 429 NE2d 746 (NY App, 1981). In *Smith, id.*, the New York Court of Appeals stated:

Finally, comment is in order on whether the dismissal of the plaintiff's prior action on Statute of Limitations and Statute of Frauds grounds was "on the merits" for claim preclusion purposes. Professor Corbin sagely notes that, since "legal rights and duties are incapable of definition without reference to societal remedies," the effect of the Statute of Frauds on the legal relations of the contracting parties brings it to the level of a rule of substantive law (2 Corbin, Contracts, § 279). . . . Suffice it to say that a dismissal on these grounds is at least sufficiently close to the merits for claim preclusion purposes to bar a second action, especially where the motion to dismiss the first action was treated as one for summary judgment on which the court considered submissions of the parties dehors the pleadings. [See also *Apostolos v RDT Brokerage Corp*, 180 AD2d 569, 570; 580 NYS2d 270 (NY App Div, 1992).]²

A review of the New York trial and appellate court decisions reveals that the courts did not address the sufficiency of the pleading (complaint). Rather, both courts went outside the four corners of the complaint and focused on the documentation attached to the complaint, concluding that it was insufficient to sustain a contractual action where it did not contain the essential terms of the alleged agreement and was not signed by the parties to be charged. The trial court found that the documentation did not comply with New York's statute of frauds and that partial performance did not act to prevent the application of the statute of frauds. This ruling was upheld on appeal. *Nemelka*, 40 AD3d 505. Consequently, the New York judgment constituted a decision on the merits.

² In *Landau, PC v LaRossa, Mitchell & Ross*, 11 NY3d 8, 14 n 3; 862 NYS2d 316; 892 NE2d 380 (NY App, 2008), the court remarked that "a dismissal based on the statute of limitations or statute of frauds grounds is a determination that the matter is irremediably flawed as a matter of law, it is equivalent to a determination on the merits for res judicata purposes." (Citation omitted.) The court then noted that dismissal based on lack of standing, prematurity, want of personal or subject-matter jurisdiction, or other forms of procedural inadequacy are not intended to have any determinative effect on an action's merits. *Id.* In supplemental authority, plaintiff cites *Joseph v Athanasopoulos*, 648 F3d 58 (CA 2, 2011); however, *Joseph* has no bearing here, where the Second Circuit addressed the res judicata impact of a dismissal predicated on a *statute of limitations* under New York law and merely certified the following question to the New York Court of Appeals:

When a plaintiff brings a discrimination claim before the New York State Division of Human Rights ("DHR") and commences an untimely Article 78 proceeding challenging the DHR's adverse determination of that claim, does the state court's dismissal of the Article 78 proceeding pursuant to the time limitations set forth in NY Exec Law § 298 amount to an adjudication "on the merits" for *res judicata* purposes, such that the plaintiff cannot litigate her claim in another jurisdiction with a longer, unexpired limitations period? [*Joseph*, 648 F3d at 68.]

The record reflects that the New York case resulted in a disposition on the merits, that the Michigan and New York litigation involved the same parties or those in privity with them, that the causes of action pursued in Michigan arose out of the same transaction as the causes of action litigated in New York (circumstances surrounding purchases of coal mines), and that the Michigan claims were either raised or could have been raised in the New York action. Accordingly, full faith and credit was due the New York decision, and the trial court here properly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) (claim is barred by prior judgment, i.e., res judicata). The New York judgment was conclusive.

Plaintiff's and the trial court's focus on the parties' interests and connections to Michigan and New York and the reliance on *Sutherland v Kennington Truck Service, Ltd*, 454 Mich 274; 562 NW2d 466 (1997),³ are entirely misplaced. Simply stated, those issues and *Sutherland* pertain to choice of law matters, and this is not a choice of law case. Rather, this case concerned the effect of a New York *judgment* on litigation in Michigan under the Full Faith and Credit Clause and res judicata principles.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction. Having fully prevailed on appeal, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens

³ In *Sutherland*, 454 Mich at 275, our Supreme Court stated:

In this choice of law case, an Ontario driver and an Ohio driver collided while on a Michigan highway. Plaintiffs filed suit in Michigan two years and twenty-two days after the accident. Both Ohio and Ontario have two-year statutes of limitations, while Michigan has a three-year statute of limitations. The trial court applied Ontario's statute of limitations, holding that Michigan had no interest in the litigation. We reverse and hold that because neither Ohio nor Ontario have an interest in having its law applied, Michigan law will apply.